87-1657

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

GIROLEMO MUSSO, MARTIN GILLEN, JOHN KROMMENHOEK, RICHARD MULLER, RALPH MOSCATELLO and KENNETH DORE, as Trustees of Teamsters Local #641 Pension Fund,

Petitioners,

vs.

JAMES A. BAKER, III, SECRETARY OF THE DEPARTMENT OF THE TREASURY, and ANN McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can an employee benefit plan post government obligations owned by the plan in satisfaction of the surety bond required by the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. § 1112(a)?

2. Did the Court of Appeals err in refusing to construe 29 U.S.C.A. § 1112(a) and 31 U.S.C.A. § 9303 *in para materia*?

THE PARTIES

The parties to the proceedings in the courts below were as follows:

Appellees (plaintiffs below):

Girolemo Musso; Martin Gillen; John Krommenhoek; Richard Muller; Ralph Moscatello; Kenneth Dore, as Trustees of Teamsters Local No. 641 Pension Fund.

Appellants (defendants below):

James A. Baker, III, Secretary of the Department of the Treasury and Ann McLaughlin, Secretary of the Department of Labor.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	i
Table of Contents	ii
Table of Citations	iv
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	6
Reasons for Granting the Writ	9
I. The Court of Appeals' refusal to read 29 U.S.C. § 1112 and 31 U.S.C. § 9303 *in pari materia* was clearly erroneous	10
A. The court's failure to read 29 U.S.C. § 1112 and 31 U.S.C. § 9303 *in pari materia* is in conflict with established principles of statutory construction.	10
B. The decision of the Court of Appeals implicitly repeals 31 U.S.C. §§ 9301, 9302, 9303 and 9309 as they may pertain to employee benefit plans.	12

Contents

Page

C. The proposal urged by the petitioners is in accordance with the plain language of both ERISA and 31 U.S.C. § 9301, *et seq.* 12

II. The Court of Appeals did not consider all relevant factors in its determination that posting of government securities would not fulfill ERISA bonding requirements. 15

A. The Fund has been unable to procure surety bonding for its fiduciaries. 15

B. The cost of such insurance, if the Fund was able to obtain it, would cause a substantial depletion in Fund assets. 16

C. As illustrated by a comparison of analogous estate law principles, the underlying purpose of the ERISA bonding requirement (*i.e.*, protection of the Fund assets) would be satisfied by the posting of government securities in lieu of a bond. 17

III. The Court of Appeals failed to consider the ramifications of its decision to reverse the decision of the District Court. 19

Conclusion 21

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Glover Const. Co. v. Andrews, 591 F.2d 554 (10th Cir. 1979), aff'd, 446 U.S. 608 (1980) 9, 10, 11

Leaf Tobacco Exporters Assoc. v. Block, 749 F.2d 1106 (4th Cir. 1984) 12

Lindquist v. Bowen, 813 F.2d 884 (8th Cir. 1987) 9, 10

Matter of Johnson, 787 F.2d 1179 (7th Cir. 1986) 9, 10

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 12

Montgomery v. Erie R. Co., 97 F.2d 289 (3d Cir. 1938) 17

Morton v. Menceri, 417 U.S. 935 (1974) 12

Musso, et al. v. Baker, et al., 834 F.2d 78 (3d Cir. 1987) 2, 8

Musso, et al. v. Baker, et al., No. 86-1611 (D.N.J. March 20, 1987) 2

Nicholas v. Rysavy, 809 F.2d 1317 (8th Cir. 1987) 11

Ordinary v. Connolly. 72 N.J. Eq. 521 (1909) 17

Perrine v. Petty, 34 N.J. Eq. 193 (1881) 17

Contents

Page

Porter v. United States Dept. of Justice, 717 F.2d 787 (3d Cir. 1983) 12

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11

SDC Dev. Corp. v. Mathews, 542 F.2d 116 (9th Cir. 1976) 11

Smith v. Robinson, 468 U.S. 992 (1984) 11

United States v. Borden Co., 308 U.S. 188 (1939) 12

Watt v. Alaska, 451 U.S. 259 (1981) 12

West v. Keve, 721 F.2d 91 (3d Cir. 1983) 12

Statutes Cited:

28 U.S.C. § 1254(1) (1982) 2

29 U.S.C. § 1002(2)(a) 6

29 U.S.C. § 1101-1114 7

29 U.S.C. § 1110(b) 13

29 U.S.C. § 1112 ..... 10, 14, 15, 16, 17

29 U.S.C. § 1112(a) ..... i, 2, 3, 6, 7, 9

29 U.S.C. § 1112(e) 13

29 U.S.C. § 1132(e) 6

Contents

Page

29 U.S.C. § 1132(k) 6

31 U.S.C. § 9301 .....i, 3, 8, 9, 12

31 U.S.C. § 9302 .....9, 12

31 U.S.C. § 9303 .....3, 4, 7, 8, 9, 10, 12, 13

31 U.S.C. § 9304 .....3, 5, 9

31 U.S.C. § 9304(b) 9, 14

31 U.S.C. § 9304-9308 .....8, 9

31 U.S.C. § 9309 .....9, 12

N.J.S.A. 3:8-1 (West 1948) 17

N.J.S.A. 3B:15-1 (West 1982) 17

N.J.S.A. 3B:15-11 (West 1982) 18, 19

N.J.S.A. 3B:15-13 (West 1982) 18

Cal. Probate Code § 541.1 (West 1955) 19

Md. Estates and Trusts Code Ann. § 15-105 (1974) 19

Ohio Rev. Code Ann. § 2109.13 (Page 1963) 19

Rule Cited:

Fed. R. Civ. P. 12(b)(6) 7

Contents

Page

Other Authorities Cited:

1974 U.S. Code Congressional and Administrative News 4666 18

31 Am. Jur. 2d, Executors and Administrators § 126 (1969) 17

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Pension and Profit Sharing Plans, Vol. 3 § 17.05(6) (1985) 18

APPENDIX

Appendix A—Opinion of United States Court of Appeals for the Third Circuit, No. 87-5323, Rendered on December 2, 1987 ..... 1a

Appendix B—Opinion of United States District Court for the District of New Jersey, No. 86-1611 Rendered on March 20, 1987 ..... 7a

Contents

Page

Appendix C—Judgment of the United States Court of Appeals Rendered on December 2, 1987 ..... 13a

Appendix D—Denial of Petition for Rehearing from the United States Court of Appeals for the Third Circuit Entered on December 2, 1987 ..... 15a

Appendix E—Other State Statutes..... 17a

Appendix F—Affidavit of Margaret Zinno Dated September 8, 1986 ..... 22a

No.

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JAMES A. BAKER, III, SECRETARY OF THE DEPARTMENT OF THE TREASURY, and ANN McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Girolemo Musso, Martin Gillen, John Krommenhoek, Richard Muller, Ralph Moscatello and Kenneth Dore, as Trustees of Teamsters Local #641 Pension Fund,

respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 834 F.2d 78 (3rd Cir. 1987).

The opinion of the District Court in Civil Action No. 86-1611 (D.N.J. Mar. 20, 1987) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 2, 1987. Petitioners timely filed a petition for rehearing and suggestion for rehearing *in banc* with the court. The petition was denied by order dated December 29, 1987. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1)(1982).

STATUTORY PROVISIONS INVOLVED

Section 412 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1112(a), provides in relevant part:

> (a) Requisite bonding of plan officials
>
> Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereinafter in this section referred to as "plan official" shall be bonded as provided in this section; . . .

> The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than ten (10) per centum of the amount of funds handled. In no case shall such bond be less than $1,000 nor more than $500,000, except that the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, subject to the 10 per centum limitation of the preceding sentence. . . . Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31. Any bond shall be in a form or of a type approved by the Secretary including individual bonds or schedule or blanket forms of bonds which cover a group or class.

Additionally, 31 U.S.C. §§ 9301, 9303 and 9304 provides in pertinent part:

> § 9301. Definitions
>
> In this chapter [31 U.S.C. §§ 9301 *et seq.*]-
>
> (1) "person" means an individual, a trust, an estate, a partnership, and a corporation. (2) "Government obligation" means a public debt obligation of the United States Government and an obligation whose principal and interest is

unconditionally guaranteed by the Government.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 1046.)

§ 9303. Use of government obligations instead of surety bonds

(a) If a person is required under a law of the United States to give a surety bond, the person may give a government obligation as security instead of a surety bond. The obligation shall —

1. be given to the official having authority to approve the surety bond;

2. be in an amount equal at par value to the amount of the required surety bond; and

3. authorize the official receiving of the obligation to collect or sell the obligation if the person defaults on a required condition.

(b)(1) An official receiving a government obligation under subsection (a) of this section may deposit it with —

(A) the Secretary of the Treasury;

(B) a Federal Reserve bank; or

(C) a depository designated by the Secretary. . . .

§ 9304. Surety corporations

(a) When a law of the United States Government requires or permits a person to give a surety bond through a surety, the person satisfies the law if the surety bond is provided for the person by a corporation —

(1) incorporated under the laws of —

(A) the United States; or

(B) a State, the District of Columbia, or a territory or possession of the United States;

(2) that may under those laws guarantee —

(A) the fidelity of persons holding positions of trust; and

(B) bonds and undertakings in judicial proceedings; and

(3) complying with sections 9305 and 9306 of this title [31 U.S.C. §§ 9305, 9306].

(b) Each surety bond shall be approved by the official of the Government required to approve or accept the bond. The official may not require that the surety bond be given through a guaranty corporation or through any particular guaranty corporation.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 1047.)

STATEMENT OF THE CASE

This petition arises from the Third Circuit's reversal of the District Court's decision granting summary and declaratory judgment in favor of the trustees of Teamsters Local 641 Pension Fund (hereinafter "Fund").[1]

The Fund is an employee benefit plan as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 412, 29 U.S.C.A. § 1002(2)(a) (hereinafter "ERISA"). Pursuant to ERISA § 1112(a), as set forth *supra* at p. 2, each fiduciary of an employee benefit plan and every person who handles money or other property of such plan is required to be bonded in an amount not to exceed ten percent (10%) of the fund assets or $500,000 whichever is less. The Fund, pursuant to its obligations under the statute, maintained a surety bond until June of 1986, at which time bond coverage was cancelled by the surety company. Through the efforts of its administratrix and through insurance brokers, the Fund attempted to obtain fiduciary liability coverage from several commercial surety companies, but was unable to procure a replacement bond.

Due to the inability to procure the requisite bond from a a commercial surety or to obtain direction from the Secretary of Labor, the Fund filed a declaratory judgment action in the District Court on April 23, 1986. The complaint sought judicial approval for the posting of Fund assets in the form of government securities in an amount equal to the amount of the required surety bond. The government securities were proposed to be posted with the Secretary of Labor in lieu of the purchase of the surety bond.

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1. The jurisdiction of the District Court was invoked under 29 U.S.C. § 1132(e), which provides that the District Court shall have jurisdiction over civil actions brought under ERISA, and under 29 U.S.C. § 1132(k), which grants jurisdiction to the District Court in any suit brought by an employee benefit plan fiduciary against the Secretary of Labor.

Petitioners cited as authority for their position, 31 U.S.C. § 9303, which provides for the use of government obligations instead of surety bonds as security. Petitioners' motion was supported by the affidavit of Margaret Zinno, the Administratrix of the Fund. The affidavit detailed the reasons for denial of surety coverage to the Fund and the attempts made by the Administratrix to procure such coverage (Appendix, *infra,* 22a). The Secretary did not dispute the factual assertions of the submitted affidavit.

Counsel for the Secretary of Labor moved for dismissal under Fed. R. Civ. P. 12(b)(6), on the grounds that there were "no circumstances under which an employee benefit plan's own assets may be used, set aside or escrowed to provide the protection to plan assets guaranteed under a surety bond arrangement."[2] The petitioners opposed the government's motion to dismiss and cross-moved for summary and declaratory judgment.

On October 20, 1986, the District Court granted the petitioners' motions for summary and declaratory judgment. The District Court, in reviewing the moving papers of the parties considered the relationship between § 412(a) of ERISA [29 U.S.C. § 1112(a)] and 31 U.S.C. § 9303. In its bench opinion, the District Court concluded: "There is no conflict between either the language of the statutes or their purposes." Thus, the District Court ordered that "the plan be permitted to deposit with the Secretary of Labor, government obligations in lieu of a $500,000.00 surety bond, thereby satisfying the bonding requirements of 29 U.S.C. § 1112."

The Secretary of Labor appealed the District Court decision by filing a Notice of Appeal on May 21, 1987. On December 2, 1987, the Court of Appeals for the Third Circuit issued a decision

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2. In addition, the government contended that the Secretary of the Treasury is prohibited from intervening in matters involving pension fund fiduciaries under 29 U.S.C. §§ 1101-1114. The petitioners did not dispute this position.

reversing the order of the District Court and remanding the matter with instructions to dismiss the petitioners' complaint. The Court of Appeals found that "neither ERISA nor the regulations promulgated thereunder expressly permit the posting of government obligations in lieu of a corporate surety bond." *Musso et al. v. Baker et al.*, 834 F.2d 78 at ____ (3rd Cir. 1987).

The Court of Appeals stated that the District Court's reliance on 31 U.S.C. § 9303 was misplaced for primarily three reasons. First, the court noted that Section 412 of ERISA does not refer to 31 U.S.C. § 9303, although it does refer to 31 U.S.C. §§ 9304-9308. Second, the court construed § 9303 to mean that the "person" required to give a surety bond must be the owner of any government securities held in lieu of such bond.[3] Thus the court held that since the securities at issue are owned by the Fund, and not the individual trustees, the posting of these securities would not satisfy ERISA's bonding requirements. Third, the court stated:

> It is clear that such a scheme does not protect the assets of the Fund — in the event of a breach of fiduciary duty by one of the Fund's trustees, the Fund's assets would be diminished by the amount of the damage caused by the breach. If, on the other hand, the fiduciaries were covered by a corporate surety bond, the Fund would be able to recover the amount of the damage caused by the breach, up to the amount of the bond.

The petitioners filed for rehearing on December 16, 1987. The petition for rehearing was denied on December 29, 1987.

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3. 31 U.S.C. § 9301 defines "person", for the purposes of Title 31 to mean "an individual, *a trust*, an estate, a partnership, and a corporation."

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals refused to read ERISA § 412(a) [29 U.S.C. § 1112(a)] and 31 U.S.C. § 9303 *in pari materia*, based on the rationale that § 412 of ERISA makes specific reference to 31 U.S.C. §§ 9304-9308, while it makes no specific reference to § 9303. In so holding, the Court of Appeals implicitly repealed 31 U.S.C. § 9303 as it may pertain to employee benefit plans.[4] The Court of Appeals' decision stands in conflict with other Circuits which have held that where two subjects deal with the same subject matter, they are to be read *in pari materia* and construed together. *Lindquist v. Bowen*, 813 F.2d 884 (8th Cir. 1987); *Matter of Johnson*, 787 F.2d 1179 (7th Cir. 1986); *Glover Const. Co. v. Andrews*, 591 F.2d 554, 561 (10th Cir. 1979), *aff'd*, 446 U.S. 608 (1980).

2. The Court of Appeals also determined that the petitioners' proposal to post government obligations in lieu of a surety bond did not adequately protect Fund assets in the event of a breach of fiduciary duty by a Fund trustee. In so doing, the court overlooked the crucial factors which should enter into a determination of the adequacy of the proposed arrangement. First, the unavailability of surety bonding for fiduciaries is a commercial reality which did not exist to such a degree at the time when Congress enacted this provision of ERISA in 1974. Secondly, even if such bonding is available, the costs associated with it would cause a significant depletion in fund assets. The depletion would be such an amount that it would run counter to the notion that the purpose of bonding is to protect fund assets. Third, an examination of analogous estate law illustrates that the underlying purpose of bonding (*i.e.*, the preservation from dissipation of assets

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4. By implication, the court's holding also repeals 31 U.S.C. §§ 9301, 9302 and 9309, which are also not specifically referred to in § 412 of ERISA, as well as 31 U.S.C §§ 9304(b) which is within the statute sections referenced in 29 U.S.C. § 1112(a).

over which a fiduciary has control) can be furthered by the posting of securities in lieu of such bond. In light of the importance of this issue to all employee benefit funds similarly situated, the posting of government obligations with an agent designated by the Department of Labor should be an acceptable alternative to the bond required by ERISA. Consequently, this is an issue of significant public importance.

I.

THE COURT OF APPEALS' REFUSAL TO READ 29 U.S.C. § 1112 AND 31 U.S.C. § 9303 *IN PARI MATERIA* WAS CLEARLY ERRONEOUS.

A. The court's failure to read 29 U.S.C. § 1112 and 31 U.S.C. § 9303 *in pari materia* is in conflict with established principles of statutory construction.

The bonding provisions of § 412 of ERISA [29 U.S.C. § 1112] and 31 U.S.C. §§ 9301, *et seq.*, which covers sureties and surety bonds, refer to the same subject matter. As such, the two federal statutes are *in pari materia* and should be construed together. *Lindquist v. Bowen,* 813 F.2d 884 (8th Cir. 1987); *Matter of Johnson,* 787 F.2d 1179 (7th Cir. 1986); *Glover Const. Co. v. Andrew,* 591 F.2d 554 (10th Cir. 1979), *aff'd,* 446 U.S. 608 (1980). The opinion of the Court of Appeals did not expressly refuse to view the two applicable acts *in pari materia*, it simply did not address the issue of statutory construction at all.

However, it is clear from the express reference within § 412 of ERISA to select sections of Title 31 which pertains to sureties and surety bonds, that the acts are *in pari materia* and should be construed together. The fact that one is a general act and one a special act does not contradict the construction urged by the petitioners. On the contrary, as made clear in *Glover Construction*

Co. v. Andrews, supra at 966:

> . . . general and special acts may be read *in pari materia*. If so, they should be construed together. When one Statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible . . .

Thus, the District Court, in relying on *Glover,* found that "[T]here is no conflict between either the language of the statutes or purposes." (11a).

Furthermore, the decision of the Court of Appeals also runs counter to the commonly accepted principle of statutory construction which mandates that absent a clearly expressed legislative intent to the contrary, if two statutes are capable of coexistence, it is the duty of the courts to regard both as effective. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Smith v. Robinson*, 468 U.S. 992 (1984); *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987); *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976).

As in the instant matter, where neither the language of the statutes nor their respective legislative histories show any intent to render the other inapplicable, the Court of Appeals should have adopted the construction which would make both statutes effective. The provisions of Title 31 which permit substitution of governmental obligations for a statutorily required bond should be applicable to the bonding provisions of ERISA, and will give effect to both statutes.

B. The decision of the Court of Appeals implicitly repeals 31 U.S.C. §§ 9301, 9302, 9303 and 9309 as they may pertain to employee benefit plans.

The decision *sub judice* of the Court of Appeals reads in part at page 80:

> "We find the district court's reliance on section 9303(a) misplaced for several reasons. First, while section 412 of ERISA makes specific reference to 31 U.S.C. §§ 9304-9308, it does not refer to 31 U.S.C. § 9303."

The only implication to be drawn from this language is that the only instance in which a court should construe two statutes together is when one statute expressly refers to another. However, the Third Circuit provided neither analysis of this position nor legal citation for its statutory construction.

Thus by implication the Court of Appeals has repealed 31 U.S.C. §§ 9301, 9302, 9303, and 9309 as they may pertain to employee benefit plans. This construction is contradictory to the established presumption against repeals by implication. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Watt v. Alaska*, 451 U.S. 259 (1981); *Morton v. Manceri*, 417 U.S. 935 (1974); *United States v. Borden Co.*, 308 U.S. 188 (1939); *Leaf Tobacco Exporters Association v. Block*, 749 F.2d 1106 (4th Cir. 1984); *Porter v. United States Dept. of Justice*, 717 F.2d 787 (3rd Cir. 1983); *West v. Keve*, 721 F.2d 91 (3rd Cir. 1983).

C. The proposal urged by the petitioners is in accordance with the plain language of both ERISA and 31 U.S.C. §§ 9301, *et seq.*

The Court of Appeals based its decision, at least in part, on the rationale that it is the individual trustees and not the plan

itself, who are required to give a surety bond. Thus, the court held that 31 U.S.C. § 9303 would only be applicable if the trustees proposed to deposit bonds personally owned by the trustees themselves. This interpretation is conclusionary and finds no support in the language of 31 U.S.C. § 9303. Nowhere in the language of the stated section is ownership of the securities required of the person posting the bond.

Additionally, this holding is inconsistent with § 110 of ERISA, 29 U.S.C. § 1110(b) which states that:

> Nothing in this subpart shall preclude — (1) *a plan from purchasing insurance for its fiduciaries or itself* to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligation by such fiduciary . . .

(Emphasis added.)

It is clear from this language that Congress intended to allow a plan to purchase insurance. A surety bond is nothing more than a contract of insurance which is under seal. *Couch Cyclopedia of Insurance Laws*, § 1:49 (2d ed. 1984). Thus, the construction that the individual trustees are solely responsible for procuring such insurance contradicts the plain language of the above section, which permits the plan to purchase the insurance.

The language of 29 U.S.C. § 1112(e) is also supportive of the petitioners' contention that Congress did not intend the individual fiduciaries to be solely responsible for bonding of a plan. The section reads, in pertinent part:

> The Secretary shall prescribe such regulations as

> may be necessary to carry out the provisions of this section including exemptions a plan from the requirements of this section where he finds that . . . *the overall financial condition of the plan* would be adequate to protect the interests of the beneficiaries and participants. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of *the financial responsibility of the plan*, . . . he may exempt such plan from the requirements of this section.

(Emphasis added.)

This statutory language makes it abundantly clear that, were the Secretary of Labor to formulate regulations to exempt plans from bonding requirements, the thrust of the inquiry would be into the fiscal solvency of the *plan* itself, not the fiscal solvency of the individual trustees.[5] If the government's position that it is the trustees who must bear responsibility for any bonding arrangements is correct, why would the Secretary need to examine the financial condition of the *plan*?

Furthermore, the language of 31 U.S.C. § 9304(b) supports the petitioners' contention that the obtaining of a surety bond through a guaranty corporation is not the only option available to the Fund. Subpart (b) of § 9304 of Title 31 is specifically

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5. Since the enactment of ERISA in 1974, the Secretary has never enacted regulations exempting employee benefit plans from bonding requirements. The five exemptions which appear in the regulations exempt certain categories of entities from being bonded, rather than detail any procedure by which pension or welfare plans may request an exemption from the bonding requirements. Given the dearth of available surety coverage, the petitioners' contend that the failure of the Secretary to comply with the statutory directive to develop regulations to exempt plans from the bonding requirements of 29 U.S.C. § 1112 should not result in the denial of the petitioners' alternative plan.

referenced within § 412 of ERISA, 29 U.S.C. § 1112. It states:

> Each surety bond shall be approved by the official of the government required to approve or accept the bond. The official *may not require that the surety bond be given through any particular guaranty corporation* or through any particular guaranty corporation.

(Emphasis supplied.)

The permissive language of that subsection indicates that the intent of Congress was not to require a singular bonding procedure, but to require government officials to accept alternative proposals which would comply with the financial guidelines set forth within Title 31.

II.

THE COURT OF APPEALS DID NOT CONSIDER ALL RELEVANT FACTORS IN ITS DETERMINATION THAT POSTING OF GOVERMMENT SECURITIES WOULD NOT FULFILL ERISA BONDING REQUIREMENTS.

A. The Fund has been unable to procure surety bonding for its fiduciaries.

The petitioners, as set forth at page 23a-24a of the Appendix have made diligent and good faith efforts to obtain commercial surety bond coverage. However, despite these efforts, the Fund has been unable to procure such coverage. It is the petitioners' contention that the unavailabiiity of such coverage is a commercial reality which is faced by many similarly situated employee benefit plans as well as directors and officers of corporations and other business entities. The present dearth of available liability coverage

> may be necessary to carry out the provisions of this section including exemptions a plan from the requirements of this section where he finds that . . . *the overall financial condition of the plan* would be adequate to protect the interests of the beneficiaries and participants. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of *the financial responsibility of the plan*, . . . he may exempt such plan from the requirements of this section.

(Emphasis added.)

This statutory language makes it abundantly clear that, were the Secretary of Labor to formulate regulations to exempt plans from bonding requirements, the thrust of the inquiry would be into the fiscal solvency of the *plan* itself, not the fiscal solvency of the individual trustees.[5] If the government's position that it is the trustees who must bear responsibility for any bonding arrangements is correct, why would the Secretary need to examine the financial condition of the *plan*?

Furthermore, the language of 31 U.S.C. § 9304(b) supports the petitioners' contention that the obtaining of a surety bond through a guaranty corporation is not the only option available to the Fund. Subpart (b) of § 9304 of Title 31 is specifically

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5. Since the enactment of ERISA in 1974, the Secretary has never enacted regulations exempting employee benefit plans from bonding requirements. The five exemptions which appear in the regulations exempt certain categories of entities from being bonded, rather than detail any procedure by which pension or welfare plans may request an exemption from the bonding requirements. Given the dearth of available surety coverage, the petitioners' contend that the failure of the Secretary to comply with the statutory directive to develop regulations to exempt plans from the bonding requirements of 29 U.S.C. § 1112 should not result in the denial of the petitioners' alternative plan.

referenced within § 412 of ERISA, 29 U.S.C. § 1112. It states:

> Each surety bond shall be approved by the official of the government required to approve or accept the bond. The official *may not require that the surety bond be given through any particular guaranty corporation* or through any particular guaranty corporation.

(Emphasis supplied.)

The permissive language of that subsection indicates that the intent of Congress was not to require a singular bonding procedure, but to require government officials to accept alternative proposals which would comply with the financial guidelines set forth within Title 31.

II.

THE COURT OF APPEALS DID NOT CONSIDER ALL RELEVANT FACTORS IN ITS DETERMINATION THAT POSTING OF GOVERMMENT SECURITIES WOULD NOT FULFILL ERISA BONDING REQUIREMENTS.

A. The Fund has been unable to procure surety bonding for its fiduciaries.

The petitioners, as set forth at page 23a-24a of the Appendix have made diligent and good faith efforts to obtain commercial surety bond coverage. However, despite these efforts, the Fund has been unable to procure such coverage. It is the petitioners' contention that the unavailability of such coverage is a commercial reality which is faced by many similarly situated employee benefit plans as well as directors and officers of corporations and other business entities. The present dearth of available liability coverage

was discussed by McCombie, *The "Catch-22" in Insurance* in 108 Newsweek, 8 (1986), and may be judicially noted.

Unlike a situation in which a fund simply refuses to obtain surety coverage, the present situation, in which petitioners are unable to obtain coverage, requires that innovative and thus far, untried, proposals be accepted in lieu of such coverage.

B. The cost of such insurance, if the Fund were able to obtain it, would cause a substantial depletion in Fund assets.

Assuming, *arguendo*, that the Fund was able to obtain commercial surety bonding the cost of such bonding would be directly adverse to the stated purpose of the ERISA bonding requirement, *i.e.*, to preserve the assets of the plan. As set forth in the Appendix at page 24a, the only price quote that was received with regard to the issuance of a bond, was at a cost of $24,000 for a policy period of six months. The extent of coverage afforded by the bond was limited to half of the amount required under ERISA, or $250,000.[6] Given the stated terms, the premium for one year for a $500,000 bond would be $96,000.[7] In five years, the costs of the premium alone would have depleted the Fund assets by an amount almost equal to the required amount of the bond. It is implausible that Congress should have intended such an incredible result.

Conversely, the proposal offered by the petitioners, the placing of $500,000 worth of government securities with an agent designated by the Secretary of Labor, would not deplete

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6. The offer was with regard to another employee benefit plan, not the Fund herein.

7. This does not even address the fact that the offered bond included a deductible amount which presumably the Fund would be required to bear and, which would not be permitted under ERISA, 29 U.S.C. § 1112.

the Fund at all. Although the Court of Appeals stated that the proposed plan did not protect the assets of the Fund, it is clear that the plan proposed by the petitioners is of greater economic benefit to the Fund's beneficiaries than the depletion of Fund assets through payment of exorbitant premiums.

C. As illustrated by a comparison of analogous estate law principles, the underlying purpose of the ERISA bonding requirement (*i.e.*, protection of the Fund assets) would be satisfied by the posting of government securities in lieu of a bond.

Pursuant to N.J.S.A. 3B:15-1, an estate fiduciary in any of several specifically enumerated instances is required to furnish a bond in an amount approved by the New Jersey Superior Court "to secure faithful performance of the duties of his office." (Pa7a). A further examination of estate law in New Jersey, as suggested by the Court of Appeals at oral argument, illustrates that the purposes of these administration bonds are analogous to the purposes of the bonding required under § 412 of ERISA, 29 U.S.C. § 1112.

According to *Montgomery v. Erie R. Co.*, 97 F.2d 289 (3rd Cir. 1938), the purpose of N.J.S.A. 3:8-1, the predecessor statute to N.J.S.A. 3B:15-1, was to protect the property of minors. Thus, the required bond acted as protection in case of misfeasance or malfeasance by the fiduciary of the estate. *Accord Perrine v. Petty*, 34 N.J. Eq. 193 (1881). The bond indemnified the estate against "default or fraud of the administrator." *Ordinary v. Connolly*, 72 N.J. Eq. 521 (1909). *See also*, 31 Am. Jur. 2d, *Executors and Administrators* § 126 (1969).

Similarly, the purpose of the bond required under § 412 of ERISA, 29 U.S.C. § 1112 is to "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others."

As noted by the Congress:

> Our primary consideration in writing pension reform legislation has been to assure that workers now covered by pension plans get their expected benefits. *U.S. Congressional Code and Administrative News,* 1974, P. 4666.

In addition, recent legal literature has recognized the protectionist purpose underlying the ERISA bonding requirements. *See generally,* Harker, *Bonding Under ERISA,* Journal of Pension Planning and Compliance 296 (1984); *Pension and Profit Sharing Plans,* Vol. 3, § 17.05(6) (1985).

A more detailed examination of relevant estate bonding law in New Jersey, discloses that a deposit of securities owned by the estate or fund in a savings institution or trust companies is permitted in full satisfaction as a substitute for the requisite administrator bond discussed *supra.*

N.J.S.A. 3B:15-11 provides:.

> [I]f the estate or fund is in cash or is invested in securities in which a fiduciary may by law invest money intrusted to him in his fiduciary capacity without special order of any court, the court may direct that any securities for the payment of money *belonging to the estate or fund* be deposited in a savings bank, savings institution or trust company . . . which depository shall be approved by the court when it directs the making of the deposit.

As provided in N.J.S.A. 3B:15-13 either the entire estate or *part of the estate* may be deposited, and such money or securities as are deposited shall only be withdrawn from the depository on

order of the court. *See also,* 6 Clapp & Black, N.J. Practice, *Wills and Administration* § 799 (1984).

New Jersey is not the only state to authorize the deposit of estate-owned securities in lieu of a fiduciary bond. As codified at Cal. Probate Code § 541.1 (West 1955), Md. Estates and Trusts Code Ann. § 15-105 (1974) and Ohio Rev. Code Ann. § 2109.13 (Page 1963), general estate law principles recognize the validity of this practice to protect the full value of an estate (19a-21a).

The proposal made by the petitioners and accepted by the District Court advocated a plan very similar to that provided for under N.J.S.A. 3B:15-11, *i.e.*, the petitioners offered to deposit $500,000 worth of government obligations owned by the Fund with an agent designated by the Secretary of Labor. Authorization for any withdrawal would rest with the Secretary of Labor. Given the similarity of the rationales behind the fiduciary bonding requirements under both ERISA and estate law, the petitioners urge this Court to recognize the preservation effect of the proposal urged by the Fund.

III.

THE COURT OF APPEALS FAILED TO CONSIDER THE RAMIFICATIONS OF ITS DECISION TO REVERSE THE DECISION OF THE DISTRICT COURT.

The Court of Appeals, in its decision, expressed "no opinion regarding the options available to the trustees." (6a). By its omission, the court has left the petitioners with three options, all of which are not feasible.

First, the Fund could operate without a bond. As is clear from this petition, the trustees have no desire to willfully act in a manner inconsistent with the stated requirements of ERISA.

However, the impossibility of compliance due to the refusal of any surety company to issue a bond, must be considered.

Second, the trustees could terminate and dissolve the Fund. This option could potentially leave the plan participants and beneficiaries without a source of benefit payments. Furthermore, this would be repugnant to the stated purposes of the bonding requirement which are to ensure that a source of monies will continue to be preserved and paid to the eligible participants.

Third, the Fund could be administered by an entity other than the trustees of the Fund. This last option is unacceptable for two reasons. First, such an arrangement would change the structure of the Fund and would violate the Fund's trust agreement. Second, the administration of a pension fund is a unique exercise which requires a specialized knowledge of the particular type of claimants involved and a familiarity of the industries within which they work. To appoint an outside party to administer this Fund would be difficult and inefficient.

It is clear that the decision of the Court of Appeals has given the Fund no guidance as to how to proceed in the absence and unavailability of a bond, or in the face of the Secretary of Labor's failure to promulgate procedures for such a situation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

KIM R. ONSDORFF
CHASAN, LEYNER, TARRANT
& D'ITALIA
Attorneys for Petitioner

D. GAYLE LOFTIS
On the Petition

APPENDIX A—OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, NO. 87-5323, RENDERED ON DECEMBER 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5323

GIROLEMO MUSSO, MARTIN GILLEN, JOHN KROMMENHOEK, RICHARD MULLER, RALPH MOSCATELLO and KENNETH DORE, as Trustees of Teamsters Local # 641 Pension Fund

v.

JAMES A. BAKER, III, SECRETARY OF THE DEPARTMENT OF THE TREASURY, and WILLIAM E. BROCK, SECRETARY OF THE DEPARTMENT OF LABOR,

Appellants

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 86-1611

Argued November 19, 1987

BEFORE: SEITZ, HUTCHINSON and ALDISERT, *Circuit Judges*.

Filed: December 2, 1987

Appendix A

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

I. JURISDICTION

This is an appeal from an order of the district court granting plaintiffs-appellees' motion for summary judgment and denying a motion to dismiss the complaint. The district court had jurisdiction under section 502(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1132(a), (e), (k) (1982). We have jurisdiction under 28 U.S.C. § 1291 (1982).

II. FACTS

Appellees are the trustees of the Teamsters Local 641 Pension Fund ("the Fund"). ERISA requires that such trustees be bonded against losses to the Fund resulting from acts of fraud or dishonesty. ERISA § 412, 29 U.S.C. § 1112 (1982). The required amount of bonding in this instance was five hundred thousand

dollars. *See id.* Appellants are the Secretaries of Labor and of the Treasury.

Until June, 1986, the trustees were covered by a bond that was backed by a corporate surety. After the bond expired, the trustees were unsuccessful in their attempts to obtain bonding from corporate sureties.

Seeking judicial approval of an alternative to surety company bonding, the trustees filed a complaint in the district court against the Secretaries. Specifically, the trustees proposed that they be allowed to deposit five hundred thousand dollars worth of Fund-owned United States government obligations with the Secretary of Labor. The trustees sought a declaratory judgment that their proposed action would fulfill ERISA's bonding requirement. There was a motion to dismiss the complaint[1] and the trustees cross-moved for summary judgment. The district court denied the motion to dismiss and granted the trustees' motion for summary judgment. This appeal followed.

III. DISCUSSION

In reviewing grants of summary judgment, our review is plenary. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). We must determine whether the Fund's posting of Fund-owned government obligations meets ERISA's bonding requirement. *See* ERISA § 412, 29 U.S.C. § 1112 (1982). Section 412(a) of ERISA requires that

> [e]very fiduciary of an employee benefit plan and every person who handles funds or other

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1. The motion to dismiss the complaint was based in part on a contention that the Secretary of the Treasury had no role in the enforcement of ERISA's bonding provision. In light of our holding, we need not decide on this appeal whether the Secretary of the Treasury was a proper party in this action.

> property of such a plan ... shall be bonded as provided in this section .... *Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the [fiduciary],* directly or through connivance with others. *Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31.* Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

Id. § 412(a), 29 U.S.C. § 1112(a) (emphasis added). Section 412(e) authorizes the Secretary of Labor to prescribe regulations to carry out the bonding requirement. *Id.* § 412(e), 29 U.S.C. § 1112(e). Section 412(e) also authorizes the Secretary to exempt plans from the bonding requirement in specified situations. *Id.* It is undisputed in the instant action that the trustees did not attempt to obtain exemption from the bonding requirement under section 412(e).

While noting that neither ERISA nor the regulations promulgated thereunder expressly permit the posting of government obligations in lieu of a corporate surety bond, the district court held that such posting fulfilled ERISA's bonding requirement. In so holding, the district court relied on 31 U.S.C. § 9303.[2] Section 9303 provides in part that "[i]f a person is required under a law of the United States to give a surety bond, the person may give a Government obligation as surety instead of a surety bond." 31 U.S.C. § 9303(a) (1982). "Person" is defined in 31

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2. Title 31 relates to money and finance. Sections 9301 through 9309 of Title 31 deal with sureties and surety bonds.

U.S.C. § 9301 to include a trust. 31 U.S.C. § 9301 (1982). Accordingly, the district court posited that the word "person" in section 9303(a) could include the Fund, which is a trust.

We find the district court's reliance on section 9303(a) misplaced for several reasons. First, while section 412 of ERISA makes specific reference to 31 U.S.C. §§ 9304-9308, it does not refer to 31 U.S.C. § 9303. Second, section 9303(a) applies to persons required to give surety bonds. In the instant situation, it is the *trustees*, not the Fund, who must give a surety bond. Therefore, section 9303(a) would be relevant only if the trustees were proposing to deposit bonds owned by the trustees with the Secretary of Labor. Indeed, a regulation promulgated by the Secretary of the Treasury provides that the person who is required under federal law to furnish a bond must be the owner of any government obligations that are posted as security in lieu of a bond. 31 C.F.R. § 225.3 (1986).

Appellees concede that the purpose of ERISA's bonding requirement is the protection of plans such as the Fund. In light of this concession, it seems disingenuous for appellees to suggest that the Fund would be protected by the course of action that the trustees have proposed. The essence of the trustees' plan is that the Fund would set aside certain of its own assets to provide a source from which "reimbursements" could be made to the Fund in the event that one of the Fund fiduciaries breaches a duty to the Fund. It is clear that such a scheme does not protect the assets of the Fund -- in the event of a breach of fiduciary duty by one of the Fund's trustees, the Fund's assets would be diminished by the amount of the damage caused by the breach. If, on the other hand, the fiduciaries were covered by a corporate surety bond, the fund would be able to recover the amount of the damage caused by the breach, up to the

amount of the bond. Thus, with a corporate surety bond, the Fund would be reimbursed for some or all of its lost assets while under the plan proposed by the trustees, the Fund would not be reimbursed at all. Accordingly, we hold that the course of action proposed by the trustees does not satisfy the bonding requirement of ERISA. In so holding, we express no opinion regarding the options available to the trustees.

In light of the foregoing discussion, we will reverse the order of the district court and remand with instructions to dismiss the complaint.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NO. 86-1611 RENDERED ON MARCH 20, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO.

MUSSO, et al.,

Plaintiffs,

vs.

BAKER, et al.,

Defendants.

BEFORE: HONORABLE CLARKSON S. FISHER, U.S.D.J.

Defendants have moved to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). Plaintiffs have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56 and for declaratory judgment pursuant to 28 United States Code Section 2201 and Federal Rule of Civil Procedure 57.

Plaintiffs have put forth the following facts which were admitted in oral argument by defendants. Plaintiffs are trustees of Teamster Local 641 Pension Fund and are required to be bonded pursuant to Section 412 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1112. Pursuant to this Act, the defendants have authority to enforce Section 412. Plaintiffs were secured by a surety bond in a form required by

Appendix B

ERISA and by regulations promulgated by the Secretary of Labor until June of 1986. In 1985, plaintiffs received notice from the bonding carrier that the surety bond was to be terminated prior to expirating arising as a result of convictions obtained against certain fiduciaries. Plaintiffs have been unable to obtain an alternative bonding carrier and propose to set aside Government obligations owned by the pension plan in an amount equal to the surety bond required under Section 412 of ERISA. The regulations promulgated by the Secretary of Labor are silent on the question of posting Government obligations in place of a surety bond. Plaintiffs assert that they could not resolve their request with the Secretary of Labor. Because of facts brought forward by plaintiffs and not disputed by defendant, defendants' 12(b)(6) motion is not appropriate and it is denied. There being obviously and by agreement no issue of material facts remaining, then summary judgment is indicated.

Plaintiffs also move for declaratory judgment pursuant to 28 U.S. Code 2201 and seek to clarify and settle a disputed legal relationship in the context of a potential or ongoing crisis and there are no genuine issues of fact as to matters presented herein as stated above. The granting of declaratory relief is proper when judgment will serve a useful service in clarifying and settling the legal relations at issue or when it will terminate and afford relief from an uncertainty and insecurity. *Maryland Casualty Company v. Rosen* 445 Fed. 2d, 1012, Second Circuit 1971. Whether the controversy is of sufficient immediacy and reality to permit a declaratory judgment is a question of degree. Plaintiffs wish to relieve their uncertainty and insecurity and it is therefore appropriate for this Court to consider a declaratory judgment.

Congress, in enacting ERISA, was concerned with insuring that participants receive their expected benefits. ERISA provides

the Secretary of Labor with the discretion to increase the amount of the bond where deemed proper and to provide regulations which would permit the exemption of certain plans from the bonding requirements. Section 412 ERISA, 29 U.S.C. Section 1112. ERISA Section 412(e) empowers the Secretary of Labor to exempt plans from the bonding requirements where the Secretary finds that (1) other bonding arrangements, or (2) the overall financial condition of the plan would be adequate to protect the interest of the Participants and Beneficiaries. Specifically, the purpose of the bond is to "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through the connivance of others." ERISA Section 412(a), 29 U.S.C. Section 1112(a).

Regulations promulgated by the Secretary of Labor at 29 C.F.R. Section 2580.412-2 provide for exemptions to the bonding requirements Defendants argue that the Secretary of the Treasury is not involved in matters of fiduciary responsibility, including bonding requirements; rather Congress has directed that regulation and enforcement of fiduciary responsibilities pursuant to Part 4 of ERISA, including bonding requirements, to be committed to the Secretary of Labor.

ERISA 412(a), 29 U.S.C. Section 1112(a), indicates that the bonding is for "protection to the plan." ERISA Section 412 and 29 U.S.C. Section 1112(a), also states that bonding may be procured from surety companies and further indicates that the generally relevant rules in federal statutes dealing with acceptability of surety bonds apply. 6 U.S.C. 6-13 (1947, amended 1972). Subsequently, Sections 6-13 of Title 6 were replaced by Sections 9304 - 9308 of Title 31. Thereafter, ERISA Section 412(a), 29 U.S.C. Section 1112(a) was also amended to read, in pertinent part, as follows:

Appendix B

. . . Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal Bonds under authority granted by the Seretary of Treasury pursuant to Sections 9304-9308 of Title 31.

31 U.S.C. Section 9304(b) states:

Each surety bond shall be approved by the official of the Government required to approve or accept the bond. The official shall not require that the surety bond be given through a guaranty corporation or through any particular guaranty corporation.

31 U.S.C. Section 9303[1] states in pertinent part;

Section 9303. Use of Government Obligations Instead of Surety Bonds--

(a) If a person is required under a law of the United States to give a surety bond, the person may give a Government obligation as surety instead of a surety bond. The obligation shall--

(1) Be given to the official having authority to approve the surety bond;

(2) Be in an amount equal to the amount at par value of the required surety bond.

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1. This is not one of the sections specifically referenced in ERISA.

Appendix B

Section 9301 defines "person" for purposes of Sections 9302-9309 to mean, "an individual, trust, estate, partnership and corporation." On its face Section 9301 does not exclude a pension plan from the definition of "person". The funds of a pension plan, moreover, are actually held under a pension trust. Therefore, a plain meaning interpretation of Sections 9301 and 9303 would lead to a conclusion that Section 9303 applies to pension plans. Plaintiff reads ERISA Section 412(a), 29 U.S.C. 1112(a) in conjunction with 31 U.S.C. Section 9303(a),(c), to find that a government security can substitute for a personal or corporate security bond. Plaintiff therefore contends that in light of the legislative interpretation of these two statutes, the plan must satisfy the bonding requirements of 29 U.S.C. Section 1112 by depositing government obligations with a par value of $500,000.00 instead of a surety bond in that amount. In support of this contention plaintiff cites;

> " . . . general and special acts may be read *in pari materia.* If so, they should be construed together. When one statute deals with a subject in general terms, and another deals with part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was past prior to the general statute unless it appears that the Legislature intended to make the general act controlling." *Glover Const. Co. v. Andrews,* 591 F. 2d 554, 561 (10th Cir. 1979) *aff'd.,* 446 U.S. 608 (1980).

Title 31 deals more specifically with surety bonds. There is no conflict between either the language of the statutes or their purposes. Plaintiffs state that the principles of statutory

construction would require that the plan be permitted to deposit with the Secretary of Labor, government obligations in lieu of a $500,000.00 surety bond, thereby satisfying the bonding requirements of 29 U.S.C. Section 1112. Therefore summary and declaratory judgment in favor of plaintiffs is granted. Plaintiffs will submit an order.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS RENDERED ON DECEMBER 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5323

GIROLEMO MUSSO, MARTIN GILLEN, JOHN KROMMENHOEK, RICHARD MULLER, RALPH MOSCATELLO and KENNETH DORE, as Trustees of Teamsters Local #641 Pension Fund,

vs.

JAMES A. BAKER, III, SECRETARY OF THE DEPARTMENT OF THE TREASURY, and WILLIAM E. BROCK, SECRETARY OF THE DEPARTMENT OF LABOR,

Appellants.

(D.C. Civil 86-1611)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY - Trenton

Present: SEITZ, HUTCHINSON and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey - Trenton. and was argued by counsel November 19, 1987.

Appendix C

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 26, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court with direction to dismiss the complaint. Costs taxed against the appellees.

ATTEST:

s/ M. Elizabeth Ferguson
M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 2, 1987

Certified as a true copy and issued in lieu
of a formal mandate on January 14, 1988.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.

APPENDIX D — DENIAL OF PETITION FOR REHEARING FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED ON DECEMBER 2, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5323

GIROLEMO MUSSO, et al.,

Appellees,

v.

JAMES A. BAKER, Secretary of the Department of the Treasury, and WILLIAM E. BROCK, Secretary of the Department of Labor,

Appellants.

(Civil Action No. 86-1611—D.N.J.)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ALDISERT, *Circuit Judges.*

The petition for rehearing filed by appellees in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

Appendix D

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

s/ Seitz
Circuit Judge

DATED: December 29, 1987

APPENDIX E — OTHER STATE STATUTES

N.J. Stat. Ann. § 3B:15-1 (West 1985)

ARTICLE 4. DISCHARGE OF SURETY AND REDUCTION OF BONDS

ARTICLE 1. GENERALLY

3B:15-1. Bonds of fiduciaries

The court or surrogate appointing a fiduciary in any of the instances enumerated below shall secure faithful performance of the duties of his office by requiring the fiduciary thereby authorized to act to furnish bond to the Superior Court in a sum and with proper conditions and sureties, having due regard to the value of the estate in his charge and the extent of his authority, as the court shall approve:

(a) When an appointment is made upon failure of the will, or other instrument creating or continuing a fiduciary relationship, to name a fiduciary;

(b) When a person is appointed in the place of the person named as fiduciary in the will, or other instrument creating or continuing the fiduciary relationship;

(c) when the office to which the person is appointed is any form of administration, except (1) administration ad litem which may be granted with or without bond; or (2) administration granted to a surviving spouse where the decedent's entire estate is payable to the surviving spouse;

(d) When the office to which the person is appointed is any form of guardianship of a minor or mental incompetent, except

as otherwise provided in N.J.S. 3E:12-16 or N.J.S. 3E:12-33 with respect to a guardian appointed by will;

(e) When letters are granted to a nonresident executor, except in cases where the will provides that no security shall be required of the person named as executor therein;

(f) When an additional or substituted fiduciary is appointed;

(g) When an appointment is made under chapter 26 of this title, of a fiduciary for the estate or property, or any part thereof, of an absentee; or

(h) When a fiduciary removes from the State, the court may require him to give such security as it may determine

Nothing contained in this section shall be construed to require a bond in any case where it is specifically provided by law that a bond need not be required.

N.J. Stat. Ann. § 3B:15-11 (West 1985)

ARTICLE 3. DEPOSIT IN LIEU OF FULL SECURITY OF BOND

A. GENERALLY

3B:15-11. When deposit permitted

If the value of an estate or fund is so great that the court in which the fiduciary received his letters or appointment deems it inexpedient to require security in the full amount prescribed by law, or if the estate or fund is in cash or is invested in securities

in which a fiduciary may by law invest money intrusted to him in his fiduciary capacity without special order of any court, the court may direct that any securities for the payment of money belonging to the estate or fund be deposited in a savings bank, savings institution or trust company incorporated under the laws of this State, or in a national bank, having safe deposit boxes for the use of private individuals, and that any money belonging to the estate or fund be deposited in a savings bank, savings institution or trust company incorporated under the laws of this State or in a national bank, which depository shall be approved by the court when it directs the making of the deposit.

Cal. Probate Code § 541.1 (West 1955)

§ 541.1 Deposited property; exclusion in computing amount of bond.

Notwithstanding the provisions of Section 541, in any proceedings for the determination of the amount of bond to be required of the executor or administrator (whether at the time of appointment or subsequently), when it appears that the estate of the decedent includes money or securities which have been, or will be, deposited in a bank or banks in this State or in a trust company authorized to transact a trust business in this State upon condition that such money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money or securities so deposited and exclude such deposited property from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money or securities to such an amount as it may deem reasonable.

[balance of statute edited out]

Appendix E

Md. Estates and Trusts Code Ann. § 15-105 (1974)

§ 15-105. Agreement of fiduciary and surety for deposit of assets.

(a) Making deposit. - Any fiduciary, or party of whom a bond, undertaking or other obligation is required, may agree or arrange with his surety for a general or a special deposit for safekeeping of any money, assets and other property, for which he is or may be responsible, with a bank, savings bank, safe deposit or trust company authorized by law to do business and situate in the county in which his bond is filed.

(b) Withdrawal of deposit. - The deposit shall be made in a manner as to prevent the withdrawal or alienation of money, assets, or other property, or any part of it, without the written consent of the surety, or an order of a court, made on notice to the surety as the court directs. (An. Code 1957, art. 16, § 199B; 1974, ch. 11, § 2.)

Ohio Rev. Code § 2109.13 (Page 1963)

§ 2109.13 Deposit of securities in lieu of bond.

In any case where a bond is required by the probate court from a fiduciary and the value of the estate or fund is such that the court deems it inexpedient to require security in the full amount prescribed by section 2109.04 of the Revised Code[,] said court may direct the deposit of any suitable personal property belonging to the estate or fund with a savings bank, national bank, or trust company incorporated under the laws of this state or of the United States, as may be designated by order of the court.

Such deposit shall be made in the name of the fiduciary and

the personal property deposited shall not be withdrawn from the custody of such bank or trust company except upon the special order of the court . . .

[Balance of statute edited out]

APPENDIX F—AFFIDAVIT OF MARGARET ZINNO DATED SEPTEMBER 8, 1986

D. GAYLE LOFTIS, ESQ.
Attorney for Plaintiff
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 86-1611F
Hon. Clarkson S. Fisher

GIROLEMO MUSSO, et al.,

Plaintiffs,

vs.

JAMES A. BAKER, III, et als.,

Defendants.

STATE OF NEW JERSEY
COUNTY OF HUDSON

AFFIDAVIT

MARGARET ZINNO, of full age, being duly sworn, according to law, upon my oath, depose and say that:

1. I am the Administratrix of Teamsters Local 641 Pension Fund, and, as such, am a fiduciary under the Employee Retirement

Appendix F

Income Security Act of 1974.

2. I am the individual who is required to inquire, and attempt to place, the Bond required of the Fund for its fiduciaries.

3. In October 1984, certain fiduciaries of this Fund, as well as fiduciaries which serve on other employee pension funds, were indicted and convicted of committing breaches of their fiduciary duties to various Welfare Funds.

4. As a result of the convictions obtained within those matters, the various Funds filed a joint claim under their fidelity surety bonds. Specifically, Teamsters Local 641 Welfare Fund's claim was filed against the One Million dollar policy which had been issued to Teamsters Local 641 Welfare and Pension Funds.

5. The aforesaid claim resulted in a total of $35,000 being recovered on the claims filed by all Funds against 3 separate bonds. The balance of monies previously determined in the court proceeding to be due to the Welfare Funds, were obtained in extrajudicial proceedings and demands.

6. Fidelity & Deposit of Maryland cancelled its bond and coverage of this Fund effective June 9, 1986.

7. A Complaint pertaining to this cancellation is being investigated by the New Jersey Department of Insurance.

8. I have attempted to contact the following companies which are engaged in surety bond business:

Union Labor Life Co. (ULLCO)
Chubb Group of Companies

Appendix F

Aetna Casualty & Surety

Additionally, I have had two separate brokers searching for this coverage.

9. The aforesaid companies referred to in paragraph numbered 10, have indicated that they either do not desire to write insurance in this field or do not wish to cover this Fund. As to ULLCO, I have not received a response either denying or accepting our application.

10. Although not on behalf of this Fund, I have made inquiry on behalf of another employee pension plan wherein I am also the Administratrix. Federal Insurance Company, which is a member of the Chubb Group of Insurance Companies, has indicated to that Plan that it will issue a Surety Bond to that particular plan in exchange for a premium of $24,000.00 being paid. The term of the Bond would be for six-months, and will not satisfy the statutory requirements of ERISA, inasmuch as it will be only for an amount of $250,000.00, with a deductible of $50,000.00.

11. In my discussions with other administrators of various Pension Plans, I am aware that this problem is being experienced not only by Teamsters Local 641 Pension Plan, but by many other Pension Plans.

12. In meetings with the Board of Trustees of Teamsters Local 641 Pension Plan, the Trustees which are the Plaintiffs herein, have indicated that they do not desire to effectuate any *exemption* from the bonding requirements of ERISA, but rather desire to have a statutory amount of the Fund assets secured for the beneficiaries and participants, should there happen to be a loss

of the Fund assets due to fraud or dishonesty of any Fund fiduciary.

13. There are presently, 3528 beneficiaries and participants within this Fund.

14. This affidavit is being submitted in connection with Counsel's opposition to the Government's Motion to Dismiss the Complaint and in support of the Plaintiff's Motion for Summary Judgment and a Declaratory Judgment.

s/ Margaret Zinno
MARGARET ZINNO

Sworn to and subscribed before
me this 8th day of September, 1986.

s/ Linda Iannone
LINDA IANNONE
A Notary Public of New Jersey
My Commission Expires Jan. 25, 1991

Supreme Court, U.S.
FILED
MAY 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1657

In the Supreme Court of the United States

OCTOBER TERM, 1987

GIROLEMO MUSSO, ET AL., PETITIONERS

v.

JAMES A. BAKER, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether trustees of an employee benefit plan may comply with the bonding requirement of Section 412(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1112(a), by depositing with the Secretary of Labor governmental obligations owned by the plan.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Statutes and regulations:

Employee Retirement Income Security Act of 1974, 29 U.S.C. (& Supp. III) 1001 *et seq.*:	
§ 412, 29 U.S.C. 1112	3, 4, 5
§ 412(a), 29 U.S.C. 1112(a)	1, 4, 5, 6
§ 412(a)(1), 29 U.S.C. 1112(a)(1)	2
§ 412(a)(2), 29 U.S.C. 1112(a)(2)	2
§ 412(e), 29 U.S.C. 1112(e)	2, 6
§ 514(a), 29 U.S.C. 1144(a)	7
31 U.S.C. 9301-9309 (Ch. 93)	5
31 U.S.C. 9303	3, 4, 5, 6
31 U.S.C. 9303(a)	4
31 U.S.C. 9304-9308	2, 4, 5
31 U.S.C. 9304(a)	6
31 U.S.C. 9304(b)	6
31 U.S.C. 9305	2, 5, 6
N.J. Stat. Ann. § 3B:15-12 (West 1983)	7
29 C.F.R. 2580.412	2
29 C.F.R. Pt. 2580, Subpt. F	6
31 C.F.R. Pt. 225	5
Section 225.3	6

Miscellaneous:

51 Fed. Reg. 23924 (1986)	2, 5

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 834 F.2d 78. The opinion of the district court (Pet. App. 7a-12a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on December 2, 1987. A petition for rehearing was denied on December 29, 1987 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 412(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1112(a), requires that plan officials (*i.e.*, fiduciaries and others who handle

plan funds) of employee benefit plans subject to ERISA be bonded in the amount of 10% of the plan's assets, up to $500,000. The bond is to "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of [a] plan official" (29 U.S.C. 1112(a)). Section 412(a) also specifies that "[a]ny bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31." [1]

2. Petitioners are the trustees of Teamsters Local 641 Pension Fund, an employee benefit plan subject to ERISA. Until June 1986, plan trustees were in compliance with ERISA's bonding requirement and were covered by a bond backed by a corporate surety (Pet. App. 2a-3a). After certain plan trustees were criminally convicted for fiduciary breaches, however, the surety company refused to renew the bond (*id.* at 8a). Petitioners then made some attempts to secure other bonding through a corporate surety, as required by Section 412, but they did not obtain a bond (Pet. App. 3a, 8a).[2]

---

[1] Section 412 excepts certain types of plans (29 U.S.C. 1112(a)(1)) and certain types of fiduciaries (29 U.S.C. 1112(a)(2)) from the bonding requirement. In addition, the Secretary of Labor is authorized by Section 412(e) to exempt plans from bonding requirements where the Secretary "finds that (1) other bonding arrangements or (2) the overall financial condition of the plan would be adequate to protect the interests of the beneficiaries and participants." 29 U.S.C. 1112(e). Pursuant to this section, the Secretary has promulgated regulations at 29 C.F.R. 2580.412 that exempt some classes of plans.

[2] In July 1986, the Secretary of the Treasury published a list of surety companies, approved pursuant to 31 U.S.C. 9305, that contained 164 surety companies licensed to do business in New Jersey, where the plan is located. See 51 Fed. Reg. 23924 (1986). The September 8, 1986, Affidavit of Margaret Zinno, plan administratrix, *reprinted in* Pet. App.

3. Petitioners subsequently brought this action against the Secretary of Labor and the Secretary of the Treasury,[3] seeking a declaratory judgment that the trustees could satisfy ERISA's bonding requirement by depositing with the Department of Labor $500,000 in assets owned by the plan and invested as governmental securities (Pet. App. 3a, 8a). The district court ruled in petitioners' favor, holding that their proposal to deposit plan-owned governmental obligations satisfied Section 412 (Pet. App. 7a-12a). The court relied primarily upon 31 U.S.C. 9303, which allows those persons "required under a law of the United States to give a surety bond" to submit instead government obligations in an amount equal at par value to the amount of the required bond (Pet. App. 10a). The court noted that Section 9303 was not among the provisions of Title 31 specifically referred to in Section 412 of ERISA (Pet. App. 10a n.1). Stating, however, that Section 9303 "deals more specifically with surety bonds," the court held that Section 9303

22a-25a, states that she contacted "[three] companies * * * engaged in [the] surety bond business" and two brokers (*id.* at 23a-24a para. 8).

Petitioners do not fall within either the statutory or regulatory exceptions to ERISA's bonding requirement. See page 2 note 1, *supra.* Moreover, petitioners have not sought an individualized exemption from the Secretary on the basis of the plan's overall financial condition or other bonding arrangements (Pet. App. 24a para. 12).

[3] The Secretary of Labor is charged with enforcement of ERISA's fiduciary responsibility provisions, including the bonding requirement of ERISA Section 412. The Secretary of the Treasury, on the other hand, has no role in the enforcement of ERISA's bonding provisions. For that reason, the Secretary of the Treasury moved in district court for dismissal of the suit against him. Although the motion was denied, the district court's final judgment contained no relief as to the Secretary of the Treasury, and the government therefore did not appeal the ruling on that motion. The court of appeals determined that it did not need to decide whether the Secretary of the Treasury was a proper party in this action. Pet. App. 3a n.1.

should be read in pari materia with Section 412 to authorize petitioners' proposal (Pet. App. 11a-12a).

The court of appeals reversed (Pet. App. 2a-6a). It held that the district court's reliance on 31 U.S.C. 9303 was misplaced, because Section 412 of ERISA specifically refers to 31 U.S.C. 9304-9308, and not to Section 9303 (Pet. App. 5a). In any event, the court concluded that Section 9303(a) would be satisfied only if the persons required to post the bond (here, the trustees) proposed to deposit governmental obligations which they (rather than the plan) owned (Pet. App. 5a). Posting assets owned by a pension plan, the court noted, does not satisfy ERISA, because it does not protect the plan against the risk of loss; in fact, the court found it "disingenuous" for petitioners to suggest that their proposal would satisfy ERISA Section 412 (Pet. App. 5a). As the court explained, under petitioners' proposal, "in the event of a breach of fiduciary duty by one of the Fund's trustees, the Fund's assets would [nonetheless] be diminished by the amount of damage caused by the breach" (*ibid.*). By contrast, if a corporate surety bond covers the trustees, the plan would be reimbursed for its losses, at least up to the limit of the bond (*id.* at 5a-6a). Accordingly, the court held, "the course of action proposed by the trustees does not satisfy the bonding requirement of ERISA" (*id.* at 6a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review of the decision below is not warranted.

1. The court of appeals correctly ruled that petitioners could not satisfy the bonding requirement of Section 412(a) of ERISA, 29 U.S.C. 1112(a), by depositing plan-owned governmental obligations with the Secretary of Labor. The

court accurately perceived that petitioners' proposal to use assets owned by the plan could not "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official," as the statute expressly requires. 29 U.S.C. 1112(a). If plan assets were used to bond the plan officials, any losses suffered by the plan because of the officials' misconduct could not truly be "reimbursed," because the losses would be paid for with other plan assets, the deposited plan-owned obligations. By contrast, a bond issued by "a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to Sections 9304-9308 of title 31" (29 U.S.C. 1112(a)) would protect the plan by enabling it to recover the loss caused by a fiduciary breach, up to the amount of the bond (Pet. App. 5a-6a).

Petitioners have cited no decision inconsistent with the interpretation of ERISA Section 412 adopted by the court of appeals in this case.[4] Instead, petitioners rely on 31 U.S.C. 9303, which provides that a person who is required under federal law to give a surety bond may instead submit governmental obligations "in an amount equal at par value to the amount of the required surety bond."[5] Petitioners

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[4] The decisions that petitioners cite as in conflict with the decision below (Pet. 9-12) have nothing to do with ERISA or the statute's bonding requirement. Instead, those decisions simply discuss general doctrines of statutory construction in other contexts, particularly the principle of *in pari materia* and the presumption against implied repeals.

[5] Chapter 93 of Title 31, 31 U.S.C. 9301-9309, sets forth a framework of standards, enforcement procedures, and alternatives relating to sureties and surety bonds that are generally required under federal law. The Secretary of the Treasury administers that chapter. He has promulgated regulations relating to surety bonds, 31 C.F.R. Pt. 225, and has published lists of surety companies that hold a grant of authority issued pursuant to 31 U.S.C. 9305. See, *e.g.*, 51 Fed. Reg. 23924 (1986). Sections 9304-9308 deal in particular with the qualifications of surety corporations and government dealings with them.

argue that 31 U.S.C. 9303 and ERISA Section 412 should be read *in pari materia* to authorize a plan official to deposit government securities in satisfaction of the ERISA bonding requirement. But even if these two statutes were read in the manner petitioners suggest, petitioners' proposal would not satisfy the requirements of 31 U.S.C. 9303. A regulation promulgated by the Secretary of the Treasury under that law provides that a person required by federal law to furnish a bond must own the government obligations that are posted as security in lieu of a bond. 31 C.F.R. 225.3; Pet. App. 5a. The governmental obligations that petitioners sought to deposit are owned by the plan, not by the trustees. Accordingly, the court of appeals correctly held that petitioners' proposal can not be justified by reference to 31 U.S.C. 9303.

In any event, as the court of appeals recognized (Pet. App. 5a), Congress expressly required in ERISA Section 412(a) that a bond "shall have as a surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to Sections 9304-9308 of title 31." [6] Congress did not refer to Section 9303, presumably because it intended to require a corporate surety bond and did not intend routinely to allow the alternative of posting government obligations in place of such a corporate surety bond.[7]

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[6] There is no merit in petitioners' suggestion (Pet. 15) that 31 U.S.C. 9304(b) prohibits the Secretary of Labor from requiring a corporate surety bond. Chapter 93 plainly contemplates that in many situations federal law will require the posting of a corporate surety bond, see, *e.g.*, 31 U.S.C. 9304(a), and ERISA Section 412(a) does just that.

[7] ERISA Section 412(c) does, however, provide for the Secretary to prescribe regulations providing for the exemption of a plan from the bonding requirements of the Section, and such regulations have been adopted. See 29 C.F.R. Pt. 2580, Subpt. F—Exemptions. Petitioners at no time have attempted to obtain an exemption pursuant to Section 412(c).

2. Petitioners maintain that it is unreasonable for the Secretary of Labor and the court of appeals to disapprove their proposal in light of "the present dearth of available liability coverage" (Pet. 15) and the high cost of securing bonding (Pet. 16-17). Petitioners' inability to secure coverage is undoubtedly related to the past administration of this particular pension plan, which resulted in the criminal convictions of plan trustees for fiduciary breaches. As we explained in the courts below, petitioners err in asserting (Pet. 19-20) that the plan and its trustees are without options. For example, the trustees could reduce their discretion over the funds they handle, and thereby make their situation more appealing to a surety company, by retaining a corporate administrator to handle the receipt of contributions and payments of claims, and by entrusting the plan assets to a bank trust department or to an insurance company for investment. In any event, even if petitioners were correct in their unsupported assertion that ERISA's bonding requirements are unwise in light of present "commercial realit[ies]" (Pet. 9, 15), that is a matter for Congress to consider. It is not a factor warranting review by this Court of the court of appeals' interpretation of ERISA's unambiguous bonding requirement.[8]

[8] Petitioners discuss state "estate bonding law" and assert that some states "authorize the deposit of estate-owned securities in lieu of a fiduciary bond" covering estate fiduciaries (Pet. 17-19). It is difficult to understand the relevance of selected state estate law to the construction of a federal law regulating employee benefit plans. Cf. ERISA Section 514(a), 29 U.S.C. 1144(a) (preempting state law relating to employee benefit plans). In any event, petitioners' state law citations do not support the proposition that a deposit of part of an estate without more (Pet. 18) always adequately protects the estate against fiduciary breach. For example, New Jersey law clearly envisions that state courts may require fiduciary bonds, even when estate-owned securities have been deposited with the court, in order to protect the remainder of the estate. N.J. Stat. Ann. § 3B:15-12 (West 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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